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Background Paper

~~CONFLICT OF INTEREST: SELECTED ISSUES~~

Margaret Young
Law and Government Division

November 1993
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CONFLICT OF INTEREST: SELECTED ISSUES

INTRODUCTION⁽¹⁾

"Conflict of interest" can be a conceptually difficult issue. Why has Parliament been unable to pass conflict of interest legislation, despite the introduction of four bills since 1988? What are the principles served by minimizing conflicts? How do those principles relate to the compliance mechanisms commonly enacted or suggested? What role is played by the independent conflicts regulatory bodies? This paper will explore these and related issues by focusing on certain topics relevant to the regulation of conflict of interest.

Several principles underlie conflict of interest rules. First are those of impartiality and integrity: legislators and decision-makers cannot be perceived as impartial and acting with integrity if they could derive a personal benefit from their decisions. The public wants assurances that decisions will be taken and laws will be enacted, and subsequently applied and administered, fairly and objectively, free of personal biases and considerations. Thus, people holding public office have a public trust that must sometimes override their freedom to order their personal economic interests.

The concept of public trust also underlies the second major principle relevant to conflict of interest rules for legislators: holders of public office should not use their office for personal gain, regardless of whether the gain is related to any activity or decisions of the legislator personally. This principle explains, for example, the prohibition commonly found in conflict of interest rules against the use of confidential information to further private interests.

The overall goal of conflict of interest regulation is to enhance confidence in public institutions. In this regard, it is one of a number of ethical issues relating to legislators,

(1) For a general overview of the topic, see *Conflict of Interest for Federal Legislators*, CIR 79-3E, Research Branch, Library of Parliament.

which include the proper role of lobbyists, election spending, the exercise of patronage, the proper use of public money and the propriety of politicians' actions generally. Examining how conflict of interest problems are handled by provincial commissions will reveal some surprising aspects of how these commissions function within this broader cluster of ethical issues and may lead to some interesting conclusions about the extent to which conflict of interest regimes, if narrowly viewed, may, or may not, achieve their overall objective of enhancing public confidence in government and Parliament.

APPROACHES TO CONFLICT OF INTEREST

Conflict of interest has been much studied at the federal level in the last decade. In 1984 the government released the Report of the Task Force on Conflict of Interest chaired by the Hon. Mitchell Sharp and the Hon. Michael Starr. The report was entitled *Ethical Conduct in the Public Sector* and is referred to as the Starr-Sharp Report. At the end of 1987 came the Report of the Parker Commission on Conflict of Interest relating to Sinclair Stevens. That report was followed three months later by the introduction of the first of four conflict of interest bills, all similar and all destined to die on the Order Paper in the course of the 33rd and 34th Parliaments. The subject matter of one of the bills was referred for study to the Special Joint Committee of the Senate and House of Commons on Conflict of Interests, which reported in June 1992.

A. Prevention or Cure?

Drawing from recent Canadian experience, it is possible to see two differing approaches to conflict of interest regulation for legislators. The first may be called the preventive approach and is illustrated by reference to the current non-statutory *Conflict of Interest and Post-Employment Code for Public Office Holders*, which has been in use since 1986 (although based on earlier versions) and applies to Ministers and Parliamentary Secretaries, as well as Governor in Council appointees. The new Liberal government has continued this Code,

slightly modified.⁽²⁾ The Code establishes as a principle that "public office holders shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising..." (section 3(5), emphasis added). This principle was also contained in the various conflict of interest bills introduced in, although not passed by, Parliament from 1988 to 1993 and may be found in a resolution adopted by the Saskatchewan Legislative Assembly in June 1993: "Every member is individually responsible for preventing potential and actual conflicts of interest, and must arrange private financial affairs in a manner that prevents such conflicts from arising."

The preventive approach does not deny that conflicts may arise despite every good intention. When they do arise, however, individuals are typically enjoined to resolve them in favour of the public interest. The compliance rules that follow from this approach tend to emphasize divestment of assets (by sale or trust) that are or are likely to be problematic to the individual, with public disclosure of assets limited to those unlikely to cause a conflict. Recusal (withdrawal from a meeting or from making a decision) is either not mentioned or is limited.

The preventive approach may be contrasted with the approach of the Special Joint Committee on Conflict of Interests, which studied one of the conflict of interest bills (Bill C-43) in the last Parliament and reported to Parliament in June 1992:

We are persuaded that conflicts of interest will arise; in itself, there is nothing morally wrong or heinous about having a conflict of interest. What is important is not that a Member insulate himself or herself to avoid conflicts of interest arising, but that clear rules and procedures be established to ensure that the conflict is resolved in the public interest... *The purpose of these rules is not to avoid conflicts arising* [emphasis added].⁽³⁾

Notably, the Special Committee's draft bill, included as part of its report, did not require Members to "act generally to prevent conflicts of interests from arising" as the bills

(2) One important change was the removal of all public servants from the Code.

(3) The Special Joint Committee of the Senate and the House of Commons on Conflict of Interests, *Report*, June 1992, p. 7; hereafter "Special Joint Committee, *Report*."

would have done. The Committee's compliance rules that followed from this approach emphasized disclosure and recusal.

The differences between the preventive and the Special Committee's approach should not be overemphasized. To some extent, they could prove more rhetorical than real. Indeed, the Committee specifically recognized divestment as a possible compliance technique. A preventive approach that required extensive divestment regardless of an individual's responsibilities would be as unreasonable as a disclosure/recusal-based system that allowed a Minister to continually recuse, to the detriment of his or her duties. The differences in approach do exist, however, and go some distance to explain why the Special Committee and the government could not agree on the best approach to take in a conflicts statute.

However the two approaches might work out in practice, it may be that the principles underlying the preventive approach are ultimately more appropriate to the goal of enhancing public confidence, particularly with regard to Ministers, than an approach that emphasizes dealing with conflicts as they come along.

B. Defining Conflict of Interest

In his Report relating to the Hon. Sinclair Stevens, Mr. Justice Parker was critical of the Code for not defining "conflict of interest," although it used the terms "real," "apparent," and "potential" to describe it. He adopted the following definition of a real conflict: "a situation in which a minister of the Crown has knowledge of a private economic interest that is sufficient to influence the exercise of his or her public duties and responsibilities." An apparent conflict arises where a reasonably well-informed person could reasonably conclude that a conflict exists. A potential conflict exists at the moment the individual becomes aware of a conflict, but before he or she exercises any duty or responsibility that could affect the interest.⁽⁴⁾

Note the emphasis on a situation, as opposed to a more narrow focus on decision-making. Mr. Justice Parker reasoned as follows:

(4) *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens*, Supply and Services Canada, 1987, p. 29-35; hereafter "Parker Report."

The duties and responsibilities of public office, particularly those of a minister are sophisticated and subtle. Immense power and influence can be wielded even in the absence of actual decision ... [P]ublic confidence and trust in the integrity, objectivity, and impartiality of government can only be conserved and enhanced if *all* of the duties and responsibilities of the public office holder are properly subject to scrutiny, not just those that involve actual decisions.⁽⁵⁾

Only an approach that focused on all the activities of a legislator (particularly a Minister), as opposed to only decision-making, would have brought within its ambit all the various kinds of conflict found by Mr. Justice Parker in the Stevens case. Of relevance also is the qualification (mentioned previously) that the private interest be an economic one.

The government bills presented to Parliament proposed a variant of Mr. Justice Parker's definition:

For the purpose of this Act, a member has a conflict of interests when the member, the member's spouse or a dependant in relation to the member has significant private interests ... that afford the opportunity for the member to benefit, whether directly or indirectly, as a result of the execution of, or the failure to execute, any office of the member.⁽⁶⁾

Although the word "situation" is not used, it is implicit in the broad reference to "any office of the member." Note also that an explicit reference to private economic interests was dropped. Although there was no specific definition of "apparent" conflict, it is likely that the definition itself was broad enough to encompass it.

Other jurisdictions confine the definition to actual decision-making. For example, the Ontario statute prohibits a member from making a decision or participating in making a decision in the execution of his or her office if the member knows that there is the opportunity to further his or her private interest or improperly further the private interest of another.⁽⁷⁾ The

(5) *Ibid.*, p. 28.

(6) Bill C-43, 3rd Session, 34th Parliament, section 2(2).

(7) *Members' Integrity Act*, SO 1994, Chap. 38, section 2. This Act received Royal Assent on 9 December 1994 but at the time of writing is not yet in force. This paper proceeds on the assumption that the new Act will come into force and all references are to it.

definition in British Columbia was similar until its amendment in 1992; now the definition focuses broadly on the exercise of any official duty or function relating to the office. Interestingly, until Ontario's new Act in 1994, the revised B.C. statute was the only one in Canada to broadly *prohibit* a legislator from acting when he or she has a conflict of interest.⁽⁸⁾

Although the Special Committee on Conflict of Interests declined to explicitly define the term "conflict of interest" (noting that the prohibitions in all of the various statutes are broader than the definition would suggest), a definition was implicit in the Committee's various prohibitions, central to which was the following: "...a Member shall not make or participate in making a decision in his or her capacity as a Member, if the Member knows or should reasonably know that in the making of the decision there is the opportunity to further, directly or indirectly, a private interest of the Member or the Member's family."⁽⁹⁾ Note the emphasis on decision-making.

C. Public Office Holders or All Parliamentarians?

At the federal level currently the only Parliamentarians who are covered by the Code are Ministers, Secretaries of State and Parliamentary Secretaries ("public office holders"). That is, the Code has been developed by the executive and applies only to it. Senators and Private Members of the House of Commons are bound by certain statutory provisions relating to conflict of interest -- those found in the *Criminal Code* and the *Parliament of Canada Act*, as well as in the Standing Orders of the House of Commons and the Rules of the Senate -- but do not have any additional rules or compliance measures. Any such regulation would have to be by way of resolutions of the Senate and/or House or by the enactment by Parliament of statutory provisions.

(8) Section 2.1 of the *Members' Conflict of Interest Act*, SBC 1990, Chap. 54, Index Chap. 255.7 states: "A member shall not exercise an official power or perform an official duty or function if the member has a conflict of interest or an apparent conflict of interest."

(9) Special Joint Committee, *Report*, Draft Bill, section 4.

The provincial statutes that regulate conflict of interest by a combination of disclosure⁽¹⁰⁾ and other techniques apply to all provincial legislators, often with additional measures applicable to Ministers, and this was the approach generally taken by the federal government in its attempts to legislate regarding conflict of interest in the 33rd and 34th Parliaments. Not everyone agrees, however, that Private Members need to be brought within a comprehensive régime. Notable among these, particularly in view of the fact of his advisory role to the current government, is the Hon. Mitchell Sharp. In testimony before the Special Joint Committee in 1992, Mr. Sharp stated that Private Members should not have been included in the bill then being discussed (Bill C-43) and that when he personally was a Private Member he did not have access to any insider information from which he could have profited. He therefore saw no point in public disclosure of private interests for this group.⁽¹¹⁾

In the interim period, Mr. Sharp has not changed his mind. Shortly after the new government was sworn in he was quoted as follows:

[Members] are the representatives of the people who debate, who vote and so on but they don't make decisions like cabinet ministers do. Members of Parliament don't know anything more than I know.

Real conflicts of interest lie with the cabinet ministers. They have access to privileged information which they can personally benefit from and therefore have to make it evident that public interest takes precedence over private interest. That's the whole purpose of conflict of interest regulations.⁽¹²⁾

Mr. Sharp advocated two sets of rules, or bills, one to govern public office holders and the other for other Parliamentarians. This approach no doubt recognizes the differing duties of Ministers and Parliamentary Secretaries, on the one hand, and Private Members, on the other, but it fails to recognize that for substantive and administrative purposes

(10) Only Quebec does not require any disclosure from Private Members of its legislature.

(11) Special Joint Committee, *Minutes of Proceedings and Evidence*, 3rd Session, 34th Parliament, Issue No. 16, p. 17; hereafter Special Joint Committee, *Proceedings*.

(12) *The Hill Times*, 11 November 1993, p. 15.

many features of the two régimes would ideally be the same. For example, it would seem advantageous to have the same body (whether it be called a Commission, a Commissioner, a Jurisconsult, an Ethics Counsellor or an Integrity Commissioner) providing advice in order to ensure a consistent approach.⁽¹³⁾ If rules for Private Members contain any level of detail at all, definitions should be the same for both groups. (The definitions of "spouse" and "dependants" or "family," for example, should be parallel.) If Private Members are to be subject to investigation, it would also seem to be the best approach to consolidate that function in one body.

Alternatively, Private Members and Senators could remain unregulated except by the existing provisions noted above.

COMPLIANCE MECHANISMS

There are a number of standard compliance mechanisms that typically accompany conflict of interest regimes, alone or in combination: confidential and/or public disclosure, sale of assets, withdrawal from offices and activities, trusts of different kinds, declaration and withdrawal from participation or voting in meetings (also called recusal), and delegation. The sale of assets and various trust arrangements are forms of divestment.

This section will discuss the nature and purposes of the various compliance techniques commonly used in conflict of interest regimes and a comparison will be made between the philosophies of compliance -- to the extent that they are apparent -- in the *Conflict of Interest and Post-Employment Code for Public Office Holders*, the Parker Report, the federal bills in the last two Parliaments, and the Report of the Special Joint Committee on Conflict of Interests of June 1992.

(13) At the federal level, the previous government proposed a three-person Conflict of Interests Commission to administer the proposed régime, and the Special Committee on Conflict of Interests proposed an individual to be named the "Jurisconsult." In some jurisdictions, a Commissioner has been established, while in others the independent person administering the regime has been named the Ethics Commissioner.

A. Public Disclosure

It has become commonplace in the last 10 years to state that public disclosure of legislators' private interests should be the cornerstone of a modern conflicts regime;⁽¹⁴⁾ it is a feature of most of the provincial statutes on the issue and was part of the proposed federal bills, although the degree of disclosure was unclear and would have depended on regulations.

There are several different purposes asserted for public disclosure. Some claim that full⁽¹⁵⁾ public disclosure serves to ensure that the public can readily see that legislators are not acting improperly. This was the approach taken by the Special Joint Committee on Conflict of Interests and the Parker Report. This approach places less emphasis on avoidance of conflicts in the first place and assumes knowledge and constant vigilance by the public (as a practical matter, by the press and likely, political opponents) and an awareness of the full range of activities of legislators.

The drawback to this approach was stated in the testimony of two political scientists before the Special Joint Committee in 1992:

Prof. Mancuso: [Disclosure] brings it to the public eye or to the attention of colleagues and others, but it doesn't necessarily mean that the conflict goes away.

Prof. Atkinson: Staff members in the [U.S.] House of Representatives told us that they were concerned that members of Congress treated disclosure as a kind of panacea. They seemed to feel that once a matter was disclosed... For example, take a member of an appropriations committee in the House of Representatives who has significant financial interests in the area in which he or she is dealing. Those interests would be clearly disclosed under the onerous disclosure provisions of the *Ethics in Government Act*.

The staffers were concerned, and perhaps their concern is misplaced, that congressmen were treating disclosure as a way of

(14) See, e.g., Parker Report, p. 348.

(15) The word "full" almost always accompanies the phrase, but typically there is provided a substantial list of exemptions of purely personal interests (residence, car, cottage), or interests very unlikely to cause conflicts (Canada Savings Bonds, GICs). These often need not be disclosed publicly.

washing their hands. So although they faced people and made decisions in areas that bore directly on significant holdings they had, their argument was that everything was now absolved, and they were all okay.⁽¹⁶⁾

The same concern was echoed in a recent British report, which noted:

... the introduction of the Register of Members' Interests, designed to further the wholly admirable concept of disclosure of interests, has tended to create a false impression that any interest is acceptable once it has been registered, and so to add to the confusion which has developed.⁽¹⁷⁾

The short answer to the foregoing problem is that, in Canada, public disclosure is an important, but not the only, compliance mechanism, as it is for federal legislators in the United States, although not in the U.K. The points mentioned above should be kept in mind, however, whenever possibly excessive claims are made for the value of public disclosure.

In addition to promoting transparency and vigilance, public disclosure can also promote avoidance of conflict of interest situations if by mere disclosure of an interest the potential for a conflict would be apparent. Most legislators would presumably rather divest themselves of the asset rather than undergo negative publicity.

A different approach to disclosure may be seen in the Code, which goes further in explicitly establishing a hierarchy of compliance mechanisms than did the proposed government bills. Assets are "declarable" and subject to public disclosure only if they are not "controlled" (sections 9, 11-13). Controlled assets are those "that could be directly or indirectly affected as to value by Government actions or policy" and are required to be divested, either by sale, trust or management agreement (sections 12-13). Declarable assets, then, are those that are left over, such as interests in family businesses, local companies, farms, and so on. The chance of these types of assets causing conflicts is inherently less than with controlled assets, although continued vigilance is required.

(16) Special Joint Committee, *Proceedings*, Issue No. 6, p. 22.

(17) *Standards in Public Life*, First Report of the Committee on Standards in Public Life, Chairman, Lord Nolan, May 1995, Ch. 2. para. 40.

The popularity of public disclosure is by no means universal. As noted above, Mr. Sharp, testifying before the Special Joint Committee was particularly critical of public disclosure for Private Members, calling it "offensive and unwise" and "a discouragement to the recruitment of candidates for election to Parliament who are involved in business and community activities."⁽¹⁸⁾

B. Declaration and Recusal

The need for declaration of an interest and recusal (withdrawal) arises when legislators, owing to the existence of a private interest, realize that to participate in a meeting or to make a decision would place them in a position of conflict. A declaration and recusal requirement is common in the conflicts legislation of the provinces and, in some, is coupled with a right of delegation of Ministerial decision-making. That is, a Minister faced with making a decision that would entail a conflict may have the Cabinet or Premier delegate another Minister to act in his or her stead.

There are no declaration and recusal provisions in the current Code and there were none in the bills presented in previous Parliaments. In contrast, the Special Joint Committee focused on declaration and recusal, along with disclosure, as the main compliance techniques.

Mr. Justice Parker recommended that recusal be used in conflict regulation, but he noted the essential problem, one faced by any régime that concentrates primarily on disclosure and recusals:

Obviously the system will be useful only where recusal is not the norm for the particular minister. Where a minister's private interests are of such a nature or extent as to require routine withdrawal from public duties, divestment of the interests or declining or resigning the office will be necessary. Nonetheless, in the more usual case of a minister with limited private interests,

(18) *Ibid.*, Issue No. 1, p. 16.

recusal will serve as a vital adjunct to the cornerstone of public disclosure.⁽¹⁹⁾

In responding to the Special Committee's report, the Hon. Harvie Andre, then Government House Leader, completely rejected the option of recusal for Ministers:

...most of what cabinet does is done in camera. The only way you can assure a skeptical public is by avoiding conflict of interest. Parliament operates in public, so the disclosure of conflicts and the recusal option [for Private Members] meet the test for seeing if someone is taking advantage of their conflict of interest. It's unnecessary to impose the same kinds of strictures on MPs, who operate in public, as it is on cabinet ministers, who operate confidentially.⁽²⁰⁾

It might also be added that a skeptical public might not, in fact, be reassured by a significant degree of recusal. Instead, even a small number of recusals could be seen as evidence that conflicts abound. Thus, the overall goal of conflict of interest regulation -- enhancing public confidence -- could be undermined by an over-reliance on recusal.

C. Divestment

The Code is explicit that certain assets and interests must be divested, either by sale or by the establishment of a trust. As was mentioned earlier, "controlled" assets are defined as those "that could be directly or indirectly affected as to value by Government decisions or policy," and include publicly traded securities, self-administered RRSPs (except those containing only exempt assets) and commodities, futures and foreign currencies held or traded for speculative purposes (section 12). Requirements for trusts are also established.

Mr. Justice Parker recognized that disclosure alone was insufficient and concluded that divestment was the tool that would have to be applied when recusal was inadequate. As a result of the Stevens situation, however, he was sharply critical of the use of blind trusts.

(19) Parker Report, p. 354.

(20) *Minutes of Proceedings and Evidence of the Special Joint Committee on Bill C-116, Conflict of Interests*, 3rd Session, 34th Parliament, Issue No. 4, p. 9.

Administrators of the Code since then have not utilized blind trusts as a divestment mechanism for family businesses. In 1994, the concept of "blind management agreement" was adopted to permit management of the asset independently of the public office holder.

In contrast, the conflict of interest bills presented to the last Parliaments did not use the term divestment, gave no guidelines as to when the use of this technique of compliance would be appropriate and included only one substantive reference to trusts.⁽²¹⁾ As noted above, however, the bills appeared to take a preventive approach and significant scope for divestment was inferred from the obligation to "act generally to prevent conflicts of interests from arising."⁽²²⁾ The vagueness of the bills served no interests -- both Ministers and the Commission would have received significantly less guidance than they do under the Code, and Private Members would have been unclear if, or under what conditions, divestment would have applied to them. It may therefore be understandable that a Committee composed of Private Members and Senators rejected the bill.⁽²³⁾

THE SCOPE OF CONFLICT OF INTEREST

A. Provincial Experience

An examination of the annual reports of the Commission on Conflict of Interest in Ontario and of the Commissioner of Conflict of Interest in British Columbia is revealing. The reports contain short summaries of some of the questions put to the Commissioners and the decisions rendered. It is interesting that many of the questions do not deal with the subject matter of conflict of interest as it is defined and regulated by the statute. Rather, the majority deal with appropriate conduct for politicians in matters unrelated to their private interests and

(21) See Bill C-43, section 10(2): "...the Commission may recommend the establishment of a trust on such terms, and subject to such conditions, as it considers appropriate."

(22) *Ibid.*, section 3(C).

(23) It is interesting to note that Mr. Justice Parker criticized the Code for being ambiguous about compliance techniques and when they were appropriate, yet the government bills were far vaguer, consisting only of a measure of public disclosure and a mention of trusts, in addition to the general principle noted above.

those of their families, although the latter is the essence of both the Ontario and the British Columbia statutes.

It can be concluded that, while conflict of interest questions do arise for members in the course of their duties, a greater number of issues come under the rubric of general propriety, common (and political) sense, and the desirability of not giving -- and appearing not to give -- improper preferences. As a result, the Commissioners, at least in Ontario and British Columbia, appear to take on a broader function than counselling and regulating conflict of interest. In doing so, they are no doubt filling a gap and rendering an important service to members of the Legislatures.

Even if the public were reassured by the existence of conflict legislation, and by the compliance measures it required, the Ontario and British Columbia experience suggests that legislators need more guidance than that technically within the jurisdiction of the Commission. The need for this kind of guidance could be recognized by the institution of ethics committees (as in the United States) or by other mechanisms, such as the Board of Internal Economy of the House of Commons. In the absence of other bodies to provide general guidance, a Conflicts Commission may be called upon to do so, regardless of its official mandate. Failure to respond to this need would leave a gap in the provision of general advice relating to ethics.

B. Perception and Reality

As noted above, Conflicts Commissioners in Ontario and British Columbia respond to a significantly wider range of issues than one would expect from their governing statutes. What exactly is the technical scope of the statutes, however, and how far would a federal bill go in dealing with what the public would probably perceive as conflict of interest situations? The answer is that conflict of interest (as it has been conceived in proposed federal bills and in provincial legislation) covers much less ethical territory than is often claimed for it. As a result, the public could be disillusioned if cases arose that were legally outside its purview and the Commissioner declined to give advice or take action, or if his or her jurisdiction to provide such advice was challenged by a Parliamentarian.

The limited scope of conflict of interest as it is currently conceived may be illustrated by two theoretical examples based on the federal bills previously presented to Parliament:

- If a Minister had ensured that a contract was awarded to a company in which his minor child held shares, there would have been a conflict of interest. If the Minister ensured that the contract was awarded instead to the Minister's adult daughter or former business partner, there would not appear to have been a violation of the bills. It seems safe to predict, however, that there would have been a public perception of improper preferential treatment and a violation of ethical standards. (Note that the Code now prohibits Ministers and their Departments from contracting with their immediate family members.)
- If a Member had used information gained as a Member and not available to the general public to make a gain on the stock market or gave such information to her spouse to do so, there would have been a conflict of interest. If, in the same circumstances, he or she had given the information to a friend, party supporter or former business associate, there would, on a bare reading of the bills, appear not to have been a conflict of interest. Yet many members of the public would no doubt consider such conduct also to be unethical.⁽²⁴⁾

Why should rules designed to lead to a restoration of public confidence lead to such jarring conclusions? The answer may be in the wide gap between the general ethical principles enunciated as purposes for such rules and the often narrow scope of the rules themselves. The obligations that would have been placed on Parliamentarians by the bills tabled in the last Parliaments contained such words as "public confidence and trust in the integrity, objectivity or impartiality of the public office holder," and set a goal for Parliamentarians to "act in a manner that will bear the closest public scrutiny." Meeting these broad, ethical standards are what the public expects; if the rules are narrowly drawn and if they are treated as technical - and maximum as opposed to minimum -- requirements by even a few Parliamentarians, the goal of enhancing public confidence will not be met.

The difficulty can be illustrated in the December 1994 decision of the Ethics Commissioner for Alberta.⁽²⁵⁾ The complaint was that the Minister of Transportation and

(24) The Special Joint Committee on Conflict of Interests would have prohibited the sharing of such information with *anyone*. The government did not accept that recommendation. The new Ontario law extends the prohibition to all to whom the information is given "improperly."

(25) Robert C. Clark, Ethics Commissioner, *Investigation Relating to Alleged Benefit Received by the Hon. Peter Trynchy, Minister of Transportation and Utilities*, 14 December 1994.

Utilities had breached the Act by employing to construct his own driveway a company that also had over \$28 million in government contracts. The Commissioner found that the Act had not been breached: the work had not been performed with the intention of providing a gift to the Minister; the price had been reasonable; and the Minister was unable personally to effect a favour on behalf of the contractor. The Commissioner was concerned, however, that there might be a perception that a favour could be given and returned, and recommended the development of guidelines for Ministers contracting with companies that do business with their departments.

Despite his finding that the Act had not been breached, the Commissioner reported that the Minister had failed to be candid with him. He recommended that the Legislature might wish to consider amending the statute to impose a legal obligation on Members "to give full and frank disclosure during an investigation by [the Commissioner's] office." Thus, although the Act had technically had not been violated, clearly high ethical standards had not been maintained, and the perception of a conflict had been possible. Premier Klein subsequently removed the Minister from his post.

As discussed above, the principle of impartiality underlies conflict of interest rules. The problem illustrated by the foregoing examples (and by the decision discussed below) is that the reach of the principle of impartiality is unclear. At one end of the spectrum, the impartiality principle dictates that legislators cannot act impartially if they stand to gain personally in a monetary way.

The prohibition against personal profit has been extended to the spouses and dependent children of public office holders, but not generally to other family members, friends, business associates and so on.⁽²⁶⁾ The impartiality principle, however, would suggest a broad approach, at least in some circumstances, on the grounds that all members of the public should be placed on the same footing vis-à-vis government and that no one should benefit solely from

(26) Interestingly, a recent decision of the Commissioner in British Columbia (discussed in detail below) held that the private interests of other people can be attributed to the legislator if the latter would benefit directly or indirectly from the benefit to that other party. If this interpretation were to be generally adopted, both of the theoretical examples presented at the beginning of this section of the paper could be found to be conflicts of interest.

a connection with a public office holder.⁽²⁷⁾ In assessing how far actual or proposed rules do extend -- and how far they should extend in view of the evolution of the public's expectations -- difficulties begin to become clear.

The more narrow the rules or situations that would be covered by the rules, the greater is the possibility that public confidence will not be enhanced. This may pose problems for legislators who hold the view that, if there is such a statute, the rules will (or should) be clear about what is acceptable and what is not. While laudable as a goal, it is probably impossible to attain, given the myriad of situations that could conceivably present conflict of interest issues and the necessity of arriving at decisions in keeping with the purpose of the rules.

In interpreting broad prohibitions, some activities will be clearly proscribed, while others will depend on the circumstances. The following caution by the Commissioner of British Columbia reproduced in Appendix A of his 1992-93 Annual Report is instructive. It appears in connection with an opinion provided to members of the Legislative Assembly concerning membership, directorship, office or patronage of non-profit community organizations:

Each specific situation can have its own special circumstances and nuances and, therefore, should be evaluated by the Commissioner at the time of the situation arising. It is much easier to answer with precision when a known factual situation exists. That is why I caution that an answer to an abstract or hypothetical question should not be seen as carved in stone but must always be capable of modification when specific factual circumstances are identified.

C. The Blencoe Decision

Even when the rules appear clear, the application and interpretation of the law can take on a life of its own. This paper would be incomplete, therefore, without a discussion of

(27) Although the current Liberal government did not change the Code extensively, it is noteworthy that the "impartiality principle" was strengthened. Noted before is the prohibition on contracting with the Minister's family; also new is the principle found in section 3(3) entitled "Decision-Making": Public office holders, in fulfilling their official duties and responsibilities, shall make decisions in the public interest and with regard to the merits of each case.

a recent opinion of the Commissioner of Conflict of Interest for British Columbia.⁽²⁸⁾ The Commissioner found Robin Blencoe, the B.C. Minister of Municipal Affairs, to be in an apparent conflict of interest in relation to a proposal for a large housing development on Vancouver Island.

1. Facts and Findings

Two of the individuals involved in the project had been active in the previous election on the Minister's behalf and had made financial contributions which had been specifically directed to the Minister's riding. One of the contributions was relatively small; the other was described as "significant." One of the individuals had been the Minister's official agent. On the basis of these (and other political activities in support of the Minister before and during the campaign), the Commissioner found that the Minister had a private interest that, given his past and projected role in the development approval process, led to the conclusion that he had an apparent conflict of interest.⁽²⁹⁾

Several aspects of this decision are particularly interesting. The first is the treatment of the term "private interest."⁽³⁰⁾ The Commissioner held that a private interest is not limited to a pecuniary interest but includes any tangible benefit to the member. In so holding, he rejected court decisions, and some traditional definitions, that had held that the

(28) Opinion of the Commissioner of Conflict for Interest on a Citizen's Complaint of Alleged Contravention of the Members' Conflict of Interest Act by the Honourable Robin Blencoe, Minister of Municipal Affairs, Recreation and Housing, 16 August 1993; hereafter "Blencoe Decision."

(29) Although no other province has a definition of conflict of interest that specifically encompasses an "apparent conflict of interest," the current Code includes it and the definition proposed in the bills introduced in Parliament from 1988-93 would appear to have been wide enough to cover it.

(30) "Private interest" in the B.C. statute is defined negatively as *not* including an interest in a decision that is of general public application, that affects a Member as one of a broad class of electors, or that concerns Members' remuneration and benefits. A similar approach is taken in other statutes and was taken in the federal bills. (An interesting exception was the proposal of the Special Joint Committee on Conflict of Interests, which proposed a definition of "private interest" that would seem to preclude the conclusion reached in the Blencoe decision.)

essence of conflict of interest was a private interest capable of being measured pecuniarily.⁽³¹⁾ The Minister had no financial interest, current or future, in the proposed development.

Further, the Commissioner held that the private interest may consist of benefits received in the past. In other words, a current decision that could be perceived as a *quid pro quo* for past favours was brought within the ambit of conflict of interest. The past favours in this case that comprised the private interest of the Minister were the campaign contributions and election assistance rendered by the individuals associated with the project. The Commissioner did not hold that all campaign activities and contributions would constitute a private interest, but where they were of particular benefit to the candidate they could be so considered.

What transforms the receipt of a private interest into an apparent conflict of interest constituting a violation of the Act is the opportunity to confer an advantage or benefit on the person who made the contribution. The Commissioner ruled that the Minister appeared to be in conflict on the basis of three actions: when he intervened to speed up the approval process, when he made a grant to the local government authority for further studies contingent on its approval in general of the project, and when he met with the proponents of the development. (The Minister had met with both supporters and opponents of the project.)

Finally, in comments not central to the case but interesting nevertheless, the Commissioner, as noted above, decided that a private interest could be attributed to a legislator if the benefit would go to a third party. The Commissioners suggested spouses (included in most legislation), other family members, close personal friends and perhaps business associates.

2. Significance

It appears that the Commissioner's treatment of "private interest" is more expansive than the statute and previous case law would suggest. Indeed, the Premier of the

(31) The Parker Commission adopted as its definition of conflict of interest "a situation in which a minister of the Crown has knowledge of a *private economic interest* that is sufficient to influence the exercise of his or her public duties or responsibilities" (Report, p. 29, emphasis added). In this, Mr. Justice Parker was following the lead of a 1973 federal Green Paper which had spoken of "private pecuniary interests."

province responded by stating that: "what Mr. Hughes [the Commissioner] did was move the goal posts quite dramatically."⁽³²⁾

The Commissioner can hardly be faulted, however, in responding to the politicians' own statements. After extensively reviewing Members' speeches in the Legislature during debate on conflict of interest, he concluded that the legislation was enacted:

to promote public confidence in elected public officials as they conduct public business. I conclude that this was seen and continues to be seen as necessary because of the low ebb to which that public confidence has sunk in recent years. ... [In this decision] my endeavour will be to reach a conclusion that will honour the heart and soul of this legislation -- the restoration of public confidence in the conduct of the people's business by politicians who have achieved electoral success.⁽³³⁾

Underlying the decision is the perceived unethical conduct of preferential treatment; that is, the principle that decisions should not be made using factors irrelevant to the intrinsic merit of a matter. It accurately reflects the principle of impartiality, which, as discussed above, has been posited as one of the underlying principles of all conflict of interest rules. As noted, the degree to which impartiality should extend is currently unclear and subject to public debate. Particularly unclear is the degree to which the principle of impartiality extends in the face of patronage decisions and the degree to which Ministers (and Cabinets?) can go in dealing with, let alone showing favouritism to, party supporters.⁽³⁴⁾

(32) *Vancouver Sun*, 20 August 1993, p. A14. Mr. Harcourt appointed another Minister to act on the development proposal (as provided for in the B.C. legislation) but declined to dismiss Mr. Blencoe, on the grounds that his mistakes did not involve any potential for him to benefit personally. Note that the drafters of the recent federal conflict of interest bills rejected the option of permitting another Minister to be delegated to make a decision. It is, therefore, unclear how such a situation would be resolved at the federal level.

(33) Blencoe Decision, p. 22.

(34) For an excellent discussion of the constitutional basis for the impartiality principle and how it underlies and affects the treatment of conflict of interest, see: Ian Greene, "Conflict of Interest and the Canadian Constitution: An Analysis of Conflict of Interest Rules for Canadian Cabinet Ministers," *Canadian Journal of Political Science*, Vol. 23, p. 233-56, June 1990.

Thus, the Premier's reaction to the decision ("he moved the goalposts") and the basis for the decision by the Commissioner (conflict of interest is about impartiality) are both understandable.

The Blencoe decision also supports the previous suggestion that Conflicts Commissioners tend to broaden the base of narrow conceptions of "conflict of interest" in order to encompass broader ethical questions. It is in this sense that the Commissioner was honouring the heart and soul of the legislation.

The decision raises some very interesting issues. The interpretation of "private interest" as including non-pecuniary interests, past benefits, and campaign assistance and contributions could potentially affect many situations. Lobbyists, for example, are often involved in leadership campaigns and federal election campaigns for the major parties. Under a conflicts regime, how should Ministers respond if the same lobbyists later make representations to government?⁽³⁵⁾ How should Ministers respond when party supporters stand to gain from their decisions? How should Cabinet respond?

These questions could also be relevant to the position of Private Members in the future. Their role is currently relatively circumscribed, because of party discipline and a narrow view of the nature of their representational duties. If party discipline were to be relaxed, however, and Members' representational duties were to be tied more directly to their constituents' wishes, Private Members could be open to more direct lobbying (as are legislators in the United States) and that could raise conflict of interest questions.

The B.C. Commissioner held that the Member's private interest can be non-pecuniary and can include campaign assistance. In the Blencoe case, however, the potential benefits to the proponents of the plan were clearly pecuniary, and so noted by the Commissioner. Does that mean that pecuniary benefit is still an essential part of the conflict of interest equation? What if the benefits to supporters were non-monetary -- a nomination for an award, for example -- or less directly monetary, such as appointment to a board or commission.

(35) In the Blencoe Decision, the Commissioner held that meeting with the proponents of the developments, given their past support, was an apparent conflict, even though the Minister met with opponents of the plan as well.

If the *quid pro quo* principle is behind the decision, could its rationale be extended to patronage appointments?⁽³⁶⁾

The decision may also serve to remind the public and legislators that, while public disclosure of financial interests may remain the cornerstone of a conflict of interest régime, it is clearly not the whole building. Nothing in the Minister's public disclosure would have had any relevance to the conflict of interest situation as found by the Commissioner.

D. The Harcourt Decision

Some of the questions left open in the Blencoe decision were resolved by the same Commissioner in his subsequent decision relating to the Premier of the province and a communications firm that had been active in NDP politics and held contracts from the government.⁽³⁷⁾ In the "Harcourt" decision of April 1995, the Commissioner acknowledged the difficulty in attempting to understand the interplay between patronage and conflict of interest rules. He regarded it as essential, however, that lines be drawn:

Under the Act ... my concern is with determining whether a Member has a conflict of interest or an apparent conflict of interest. It is neither express nor implicit in those sections that I am to act as a "watchdog on patronage" and thus it is generally not my duty to monitor whether government contracts are awarded on the basis of party affiliation. It becomes my concern however if a government decision, in which a Member has a role to play, is made or reasonably perceived to have been made after a personal benefit amounting to a "private interest" has been conferred upon the Member by someone who stands to gain from the decision. This will amount to either a conflict or an apparent conflict of interest.⁽³⁸⁾

(36) It is noteworthy that there has been ongoing public criticism of the grounds on which some Order in Council appointments are perceived to be made. No doubt the principle of impartiality also underlies those criticisms.

(37) In the matter of Applications by Jack Weisberger, Member of the Legislative Assembly for Peace River South, and by Kim Emerson with respect to Alleged Contravention of Provisions of the Members' Conflict of Interest Act by the Honourable Michael Harcourt, Member of the Legislative Assembly for Vancouver-Mount Pleasant, 17 April 1995.

(38) *Ibid.*, p. 27.

The Commissioner went on to say that campaign contributions that directly and particularly benefit a Member, followed by the awarding by the Member of a patronage contact to the contributor, can give rise to an apparent conflict of interest. He found that this had not been the situation in the Harcourt case; accordingly, and for a number of other reasons, the Commissioner found that there had been no breach of the Act.

THE BOARD OF INTERNAL ECONOMY

As discussed above, at the provincial level there has been a tendency for at least some Conflicts Commissioners to respond to a broad range of issues, many of which do not relate directly to conflict of interest. At the federal level, both the administering of a statute and any *de facto* broadening of the Commission's mandate could cause particular problems in relation to the House of Commons Board of Internal Economy, which, by virtue of the *Parliament of Canada Act*, has exclusive jurisdiction over the propriety of the use of any funds, goods, services or premises made available to members for the carrying out of their parliamentary functions.⁽³⁹⁾ Thus, the interpretation of what constitutes "parliamentary functions" has, at least partially, been conferred on the Board, which will no doubt be inclined to guard that jurisdiction, and possibly to interpret it as extending to the definition of parliamentary functions for all purposes.

Both the Ontario and the British Columbia conflicts statutes contain a clause specifying the Act does not prohibit the activities in which members normally engage on behalf of constituents.⁽⁴⁰⁾ A number of the decisions in the Ontario 1992-3 Annual Report made

(39) *Parliament of Canada Act*, R.S. 1985, Chap. P-1, section 52.6. In the Senate, the Standing Senate Committee on Internal Economy, Budgets and Administration has the same mandate, subject to approval by the Senate.

(40) *Members' Integrity Act*, 1994, SO 1994, Chap. 38, s. 5. Interestingly, the new Ontario Act specifies that the activities must be those in which members engage "in accordance with Ontario parliamentary convention." *Members' Conflict of Interest Act*, SBC Chap. 54, Index Chap. 255.7, section 5. Bill C-116, the last of the four conflict of interest bills of the previous Parliaments, contained language that raises the same issue as the wording of these provisions. It also contained other provisions that would have directly involved the Jurisconsult (the equivalent to the Commission for Members and Senators who were not in the Cabinet) in assessing questions relating to travel expenses paid by the House of Commons.

reference to this provision.⁽⁴¹⁾ Thus, the Commissioner held that a letter of support in reply to a tender offer, forwarding letters on behalf of constituents, signing petitions in federal matters and contacting government departments or agencies for general information were all normal constituency activities, whereas attending as an observer at an election in a foreign country was not within the normal responsibilities of members of the Legislature. It is not suggested that there would necessarily be any disagreement at the federal level if a Commission were to provide similar opinions, merely that an overlap could exist.

On the other hand, another example from Ontario would more clearly fall under the exclusive jurisdiction of the Board of Internal Economy, should the issue arise at the federal level, because it involved the use of premises and services provided to members. A constituency assistant asked if it would be proper to allow a constituent to use the Member's fax machine to send an announcement to the media in Toronto. The decision was that use of the machine to send documents to government agencies fell within the provision quoted above as an activity in which members normally engage on behalf of constituents; to send documents to the media, however, was unrelated to government business and would be inappropriate and a misuse of government property.⁽⁴²⁾

It seems clear that at the federal level there is at least the possibility of overlapping, and possibly conflicting, jurisdiction between the Board and a Commission. The possibility of conflict is increased by the fact that the Board's definition of "parliamentary functions" is very general.⁽⁴³⁾

(41) Similar issues are dealt with in the Annual Reports of the B.C. Commissioner of Conflicts.

(42) Ontario, Commission on Conflict of Interest, *Annual Report 1992-93*, p. 10.

(43) *By-Laws under the Parliament of Canada Act*, April 1993, By-Law 101: "'parliamentary functions' ... means duties and activities related to the position of Member of the House of Commons wherever performed and includes public and official business, and partisan matters, but does not include the private business interests of a Member or a Member's immediate family."

CONCLUSION

This paper has discussed some of the most topical and problematic aspects of conflict of interest regulation of potential relevance for Parliamentarians. Some areas not touched, however, are also important and should be kept in mind. These include: post-employment restrictions for Ministers and Parliamentary Secretaries, the inclusion of spouses within a conflicts régime, and the regulation of conflicts of interest of other federal office holders, such as senior public servants and Governor in Council appointees.

Despite the difficulties of developing a conflict of interest regime at the federal level, provincial experience indicates that it can be done and, it is suggested, that it is worth doing. It may be that the 35th Parliament can build on the experiences of its predecessors and find the right mix of privacy and regulation and the right distinctions between Ministers and Private Members, and can agree on a philosophical approach that will satisfy both a sceptical public and Parliamentarians who wish to do the right thing at an acceptable cost.

